ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

ABDUL AL-SHIMMARI,

Plaintiff-Appellee,

v.

SETTI RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, ~~and~~ UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C., ~~Jointly~~ and ~~Severally,~~

Defendants-Appellants.

Supreme Court No._____
COA: 262655 ~~oP~~ 11/1/05
L.C. No.: 04-407162-NH

Wayne
E. Thomas

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AIPL
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APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

PROOF OF SERVICE

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ORDER BEING APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellants, SETTI RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C., seek leave to appeal form the Michigan Court of Appeals' November 1, 2005 Opinion which reversed the circuit court's decision granting the Defendants' Motions for Summary Disposition and remanding the case for further proceedings. A copy of the Court of Appeals' November 1, 2005 Opinion is attached hereto as **Exhibit "A."**

Defendants respectfully request that this Court grant leave to appeal to consider the erroneous holding by the Court of Appeals that a jury trial is required when a Motion for Summary Disposition raises insufficiency of service of process under MCR 2.116(C)(3) and the expiration of the Statute of Limitations under MCR 2.116(C)(7). This holding will have a grave impact on the trial court's because plaintiffs will request a mini trial on all service of process issues and possibly all Statute of Limitations issues. The "highly efficient, economical immediate trial option provided in MCR 2.116(I)(3) . . . would be rendered worthless . . .if every factual dispute was required to be submitted to a jury . . . ." *Whitmore v Fabi,* 155 Mich App 333, 344; 399 NW2d 520 (1986). Additionally, this Court should also grant leave to appeal to consider the erroneous holding of the Court of Appeals because of its failure to follow this Court's analysis on the agency/principal theory set forth in *Kambas v St Joseph's Mercy Hospital of Detroit,* 389 Mich 249; 205 NW2d 431 (1973) and *Dyke v Richard,* 390 Mich 739; 213 NW2d 185 (1973) (both cases superseded by statute on the issue of the last treatment rule). Alternatively, Defendants request that this Court summarily reverse the Court of Appeals' ruling and reinstate the Orders dated October 22, 2004 and April 20, 2005 of the Wayne County Circuit

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Court granting summary disposition to all Defendants. (A copy of the two Circuit Court Orders are attached hereto as **Exhibit "B."**)

The transcripts from the trial court are attached hereto as **Exhibit "C"** and **Exhibit "D."** Since **Exhibit "C"** contains two transcripts, they will be referred to as **Exhibit "C" Vol **, p **.**

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STATEMENT OF QUESTIONS PRESENTED

I. **SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE TRIAL COURT IS REQUIRED TO CONDUCT A JURY TRIAL ON A MOTION BROUGHT PURSUANT TO MCR 2.116(C)(3) AND (C)(7) WHERE A PLAINTIFF FAILS TO EFFECTUATE SERVICE OF PROCESS ON A NAMED DEFENDANT PRIOR TO EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS?**

Defendants-Appellees say "**YES**."

Plaintiff-Appellees say "No."

II. **SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER A PLAINTIFF CAN PURSUE A CAUSE OF ACTION AGAINST THE PRINCIPAL WHERE HE FAILS TO EFFECTUATE SERVICE OF PROCESS ON THE NAMED AGENT PRIOR TO THE EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS WHEN HE VOLUNTARILY CHOSE TO PURSUE A CLAIM AGAINST BOTH THE AGENT AND THE PRINCIPAL.**

Defendants-Appellees say "**YES**."

Plaintiff-Appellees say "No."

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STATEMENT OF MATERIAL PROCCEDINGS AND FACTS

I. Factual Background:

Plaintiff, Abdul Al-Shimmari, claims injury from the surgery performed by Defendants on September 17, 2001. Accordingly, the two-year Statute of Limitations for such claim would run on September 17, 2003.

Plaintiff served all Defendants with a Notice of Intent (NOI) dated September 16, 2001, one day prior to the expiration of the Statute of Limitations.[1] Pursuant to MCLA 600.2912b, the filing of Plaintiff's Notice of Intent tolled the Statute of Limitations for 182 days. This 182 day period ended on March 16, 2004, and Plaintiff had 1 day remaining in the 2 year Statute of Limitations period to effectuate service on the Defendants.

Plaintiff timely filed his lawsuit on March 10, 2004. Upon information and belief, the Summons and Complaint were placed into the hands of a private process server for personal service on Defendants, which had to be effectuated by March 17, 2004, or Plaintiff's claims would be time-barred.[2] However, Plaintiff never attempted to serve Defendant, Dr. Setti Rengachary, in person or by mail until March 18, 2004, the day after the Statute of Limitations expired. Rather, the Complaint was erroneously delivered to Murali Guthikonda, M.D., who acknowledged service on the evening of March 17, 2004. Further, Plaintiff filed Returns of Service alleging that the other three Defendants, the DMC, Hospital and UNSA, were all served on March 11, 2005.[3]

[1] Scott Saurbier was appointed by the insurance company to represent the Defendants. He forwarded a standard letter requesting signed authorizations and that all communication be directed to him during the NOI period.
[2] See *Gladych v New Family Homes, Inc.*, 468 Mich 594; 664 NW2d 705 (2003).
[3] Defendants also questioned the validity of the alleged service on these Defendants but this is a non-issue for this appeal.

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II. Procedural History:

A. The Lower Court:

On April 16, 2004 counsel for Dr. Rengachary filed a Motion for Summary Disposition in Lieu of an Answer pursuant to MCR 2.116 (C)(7) and (8), seeking dismissal of the lawsuit against him because he was not served with the Summons and Complaint prior to March 17, 2004, the date on which the Statute of Limitations expired. (**Exhibit "E."**) On April 17, 2004, counsel then filed another Motion for Summary Disposition pursuant to MCR 2.116(C)(2), (3) and (8) for lack of proper process and service upon Dr. Rengachary within the Statute of Limitations and Summary Disposition pursuant to MCR 2.116(C)(7), (8) and (10) for all Defendants concerning the expiration of the Statute of Limitations on any allegations of malpractice prior to September 17, 2001. (**Exhibit "F."**) Further, Defendants, the DMC, Harper Hospital and UNSA, also filed a separate Motion for Summary Disposition seeking their dismissal because the case involved no direct claims of negligence, that Dr. Rengachary was not an employee or agent of the DMC and Harper Hospital, and UNSA could not be liable since the agent had been dismissed. (**Exhibit "G."**) Prior to the filing of any response by Plaintiff, Defendants filed a Supplemental Brief in Support of the summary disposition Motion, which included two Affidavits[4] affirming that the DMC and Hospital were non-involved parties as the Hospital was merely the situs for the surgical procedural. (**Exhibit "H."**) Moreover, Mary Ann Krueger identified herself as the Risk Management Claim's Consultant for the DMC, the owner of the Hospital involved in this lawsuit. She explained that Dr. Setti Rengachary:

> [w]as not employer-agent of the Detroit Medical Center or Hospital before, on, or after the dates complained of in Plaintiff's Complaint.

[4] The first Affidavit was suggested by the trial court in denying Plaintiff's Motion to Compel a deposition of the Hospital Risk Manger. The second Affidavit was an Affidavit of Non-Involvement for the DMC and the Hospital that was filed with Defendants' responsive pleadings.

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Further, Mrs. Krueger also affirmed that:

> University Neurosurgical Associates, P.C. is a separate entity not owned or operated by the Detroit Medical Center or Harper Hospital, and was an entity owned and operated in part by Dr. Rengachary.

Id.

The hearing on Defendants' Motions was scheduled for May 14, 2004. After a conference in Chambers, the Court ordered an evidentiary hearing to determine whether Dr. Rengachary was served prior to March 17, 2004. Plaintiff's counsel raised no objection to the Court's request and the parties were instructed to check their calendars and agree on respective dates for the hearing. After a number of months, the parties finally agreed on September 29, 2004.[5]

1. The Evidentiary Hearing Concerning Service of Process.

The hearing on September 29th began with the testimony of the process server, Lois Wincel. Ms. Wincel offered her Proof of Service establishing that she served Dr. Rengachary on March 11, 2004 at the Harper Professional Building, 4160 John R, Suite 930, Detroit, MI 48201 at 2:15 p.m. on March 11, 2004. Ms. Wincel further testified that while the Proof of Service was not completed on the day she effectuated service, she thought it was "a few days later." **(Exhibit "C" TR Vol I p 16.)** But, she really had no explanation as to why it took over a month to sign the Proof of Service. **(Exhibit "C" TR Vol I p 33.)** Moreover, Ms. Wincel also testified about various documents contained in her file that she utilized to assist in purportedly effectuating service on Dr. Rengachary. Her file contained:

> A picture of Dr. Rengachary that has an address on it. And also a address for the University of Neurosurgical Associates . . . a page from the internet search for University Neurosurgical Associates [with a John R address and a Northwestern Hwy address] with a picture of the agent, Murali

[5] While waiting for the hearing, Plaintiff served extensive interrogatories and filed Motions to seek inappropriate depositions.

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> Guthikonda, M.D. and a directional map to the Harper Professional Office Building at suite 925 is crossed out and 930 is written on here.

(Exhibit "C" TR Vol I p 19, 21, 25.) Many of the handwritten remarks on the sheets of paper were not in Ms. Wincel's writing. **(Exhibit "C" TR Vol I p 21, 27.)** Even more noteworthy, while the documents fail to contain the date of March 11, 2004, Ms. Wincel testified "I would know that date. I just have the times down." **(Exhibit" C" TR Vol I p 24, 28, 31.)**

Ms. Wincel was also asked to explain handwritten notes on the "Harper University Hospital Patient Visitation Policy, Defendant's Exhibit 5." In the right hand corner of the document, there is a name "**Glenarch.**" In response, she claimed:

> Glen Arch is actually Dr. Rengachary and that's just how I wrote it down at the time real quick, once again in shorthand. . . . I kept thinking in my mind Glen Gachary [ ] for some reasons so that's what I had put is Glen Arch but I know that when I did his process service that I did call him Dr. Rengachary.

(Exhibit "C" TR Vol I p 26-27.)

The process server also provided suspicious testimony concerning the sequence of service events on March 11th. She had gone to University Neurosurgical Associates and was told that Dr. Rengachary was not there **(Exhibit "C" TR Vol I p 22)** but that "it was at Harper Hospital." **(Exhibit "C" TR Vol p 35.)** She left and did not make service on University Neurosurgical Associates, P.C. even though she had a Summons and Complaint for the corporation. Dr. Rengachary was located at the building adjacent to the Hospital on the 9th floor, and Ms. Wincel believed "he was wearing a while coat." **(Exhibit "C" TR Vol I p 22, 28.)** Ms. Wincel returned to University Neurosurgical Associates, P.C. and "that was the *second time* that I had gone there that day." **(Exhibit "C" TR Vol I p 22-23.)** (Emphasis supplied.) (The three Proofs of Service for March 11, 2004 indicate that Dr. Rengachary was served at 2:15 p.m., the Detroit Medical Center at 2:25 p.m. and University Neurosurgical Associates, P.C. at 3:20 p.m.)

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Following Ms. Wincel's testimony, the parties were instructed that the evidentiary hearing would continue on October 4, 2004. The first witness called on that date was Dr. Rengachary (**Exhibit "C" TR Vol II p 6**), who was called to testify about statements contained in his Affidavit, and to the fact that he was not served until March 18, 2004, the day after the Statute of Limitations expired. He had never seen Ms. Lois Wincel before September 29th when she was on the stand, and he was not served with anything on March 11, 2004. **(Exhibit "C" TR Vol II pgs 7-8.)** He also stated that he never wears a "white coat" when he is in the clinic. "I always wear a dark suit like I have on now. . . . it depends on the physician, some physicians do and some don't [wear a white coat]. I never do." **(Exhibit "C" TR Vol II pgs 8-9.)**

The first time that Dr. Rengachary learned of this lawsuit was on the afternoon of March 18th, when a man barged into his office while he was with a patient and left the Summons on his desk. **(Exhibit "C" TR Vol II p 9-10.)** Dr. Rengachary believed the man was "the gentleman that was sitting in the back row way in the corner with the glasses, and somewhat heavyset" on the first day of the hearing. **(Exhibit "C" TR Vol II p 10-11.)** Dr. Rengachary was also asked about the mysterious change on the restricted delivery envelope that Plaintiff's counsel attempted to mail to him, and whether he was familiar with the name "Glen Arch." **(Exhibit "C" TR Vol II p 14.)**

On cross examination, Plaintiff's counsel inquired about statements made by Dr. Rengachary's counsel in the Motion for Summary Disposition that Dr. Rengachary had not been personally served. Following objection by Mr. Saurbier, the trial court inquired "What's the point of this?" Mr. Sokolowski relayed that:

> My point of it is to bring the inconsistencies that were filed, the motion, and what Dr. Rengachary is testifying to now as well as in an affidavit that was filed by Dr. Rengachary.

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The trial court overruled the objection, concluding that it would "take the answer for whatever it's worth." **(Exhibit "C" TR Vol II p 17.)** Plaintiff's counsel instructed Dr. Rengachary to read the highlighted portion of page 2 of the Motion, which provides:

> Plaintiff never attempted to serve Dr. Rengachary in person or by mail. Rather, the Complaint was erroneously delivered to Murali Guthikonda, who acknowledged service on the evening of March 17, 2004. On March 18 or later – after the statute of limitations had expired –

(Exhibit "C" TR Vol II p 18.) Dr. Rengachary was cutoff by Plaintiff's counsel and precluded from reading the remainder of the Motion, which provides:

> On March 18 or later – after the statute of limitations had expired – Dr. Rengachary [was] put on notice of the lawsuit being filed by virtue of the papers delivered by Dr. Guthikonda.

Dr. Rengachary was then directed to paragraph 7 of his May 13th Affidavit, which provides "I was not served with any legal papers mentioned above prior to the afternoon of March 18th, 2001." **(Exhibit "C" TR Vol II p 20.)** Dr. Rengachary explained in great detail where he was working on March 18th, who was working with him, and precisely what occurred when the man barged into the examination room with papers for him on that day. **(Exhibit "C" TR Vol II p 29-33.)** He also explained that since March 11, 2004 (the date that the process server claims to have made service) was a Thursday, he would have been wearing a suit in the clinic, Suite 925, and seeing patients **(Exhibit "C" TR Vol II p 8-9, 35-36, 38-39.)**, and not in Suite 930 (as provided on the proof of service) (and also on Ms. Wincel's notes). **(Exhibit "C" TR Vol II p 39-40.)**

Plaintiff's counsel asked Dr. Rengachary to comment on why the Motion filed by his attorney, Scott Saurbier, on April 16, 2004 did not state that he was personally served on March 18th. To that Dr. Rengachary replied:

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I don't know. . . . I talked to Risk Management, and then subsequently they contacted Saurbier's office. The question of service was raised and it was analyzed, and eventually we came to the conclusion there were numerous inconsistencies and lack of facts pertaining to the service. And the only service that we are aware of positively is the 18th service, that to me, at least, from my point of view.

(Exhibit "C" TR Vol II p 34.) Counsel again asked for the same information as follows:

Q And your lawyers were aware of your not being personally served prior to April 16th, correct? Isn't that true, Dr. Rengachary, it had to be if you filed a motion on your behalf?

A I think that's something that you have to resolve with the lawyer. To the best of my knowledge we looked at all the facts and decided there were a lot of inconsistencies, and I was served on March the 18th.

(Exhibit "C" TR Vol II p 36-37.)

Additionally, Ms. Newson, Dr. Rengachary's medical assistant, testified that she has never seen Lois Wincel, the process server, Dr. Rengachary never wears a white coat when he is in the clinic, and she believes that the male who provided the papers to Dr. Rengachary on March 18th was sitting in the courtroom on September 29th, the first day of the hearing. **(Exhibit "C" TR Vol II p 43-45.)** Concerning the process server on March 18th, she described him as follows: "this gentleman had a black coat on that day, black jacket on. And he came into the office, . . . Dr. Rengachary's being served legal papers, . . ." **(Exhibit "C" TR Vol II p 45)** and she agreed that he was not wearing a khaki uniform. **(Exhibit "C" TR Vol II p 47.)**

Plaintiff's counsel also called Mr. Al-Shimmari and the Post Master to testify. However, their testimony is not relevant at this time. Mr. Daoudi thereafter attempted to call one more witness, an attorney who was seated in the courtroom on September 29th, apparently in the exact seat that Dr. Rengachary and Ms. Newson claimed was occupied by the male who barged into

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Rengachary's office on March 18, 2004. **(Exhibit "C" TR Vol II p 85.)** However, the trial court would not allow such testimony and stated:

> All of this is peripheral to the decision I have to make. And there's no sense in cutting up the record with more testimony and the issue of whether or not Dr. Rengachary was served prior to the expiration of the Statute of Limitations, which is what this hearing is all about. . . **So it doesn't matter who barged into the office on the 18th, it's kind of irrelevant at this time.**

(Exhibit "C"TR Vol II p 85-86.) (Emphasis supplied.) Mr. Daoudi responded:

> But in terms of protecting the credibility of the witness that just spoke, that attorney will definitely say that he did not barge in. She's actually identified him, it would go to her credibility as to who – that's the whole story of this March 18th story.

(Exhibit "C" TR Vol II p 86.) The trial court refused any additional testimony and moved to closing arguments. In closing, defense counsel pointed to the appropriate court rule, MCR 2.105(A), that requires service by delivery to the defendant personally or sending a Summons and Complaint by registered and certified mail, return receipt requested. Lois Wincel, the process server provided inconsistent testimony about who she served on March 11th. **(Exhibit "C" TR Vol II p 87.)** Mr. Saurbier also pointed out that the Proof of Service was not completed by Ms. Wincel until almost a month following the alleged service, her notes did not contain the date of service on Dr. Rengachary and the person that she served in the clinic at 2:15 p.m. (which was after clinic hours) wore a white coat. **(Exhibit "C" TR Vol II p 87-89.)** But more interesting, defense counsel stated that if Dr. Rengachary were in fact served on March 11th then why "would they go through and jump through all the hoops to have him served by return receipt restricted certified mail four days later on March the 15th?" **(Exhibit "C" TR Vol II p 88.)**

Plaintiff concentrated solely on the disagreement between Dr. Rengachary and Ms. Newson as to what clothing the man who barged into the office on March 18th (the day following the

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expiration of the Statute of Limitations) was wearing and argued that this created an issue of credibility to be decided by the trier of fact (**Exhibit "C" TR Vol II p 91-92**), along with the purported inconsistencies between Dr. Rengachary's Affidavit and the Motions prepared by his counsel. (**Exhibit "C" TR Vol II p 91-92.**) Further, Co-Counsel, Mr. Sokolowski offered that even though Dr. Rengachary was personally served on March 11th as indicated by the proof of service of Lois Wincel, he was trying to cover all basis and in case Dr. Rengachary said that he was not served, they decided to send him the Summons and Complaint by certified mail restricted delivery, but somehow the address was changed. (**Exhibit "C" TR Vol II p 95.**) The Court interjected and stated:

> It's just as possible that it was returned to your law office and somebody at your law office changed it, that's just as logical as saying Dr. Rengachary changed the address and then returned it to the post office. I mean that doesn't make any since (sic), that argument.

(Exhibit "C" TR Vol II p 97.)

The trial court then rendered its ruling:

> Based on the testimony that I've heard the Court is not persuaded that Ms. Wincel served, personally, Dr. RENGACHARY on the 11th of March. The Court is of the opinion that she perfected se4rvice on someone, in all likelihood, she perfected service on Dr. Guthikonda, who told Dr. RENGACHARY that there was a lawsuit and asked him about it, and he said he didn't have anything to do with the services that were rendered to Abdul Al-Shimmari, that don't worry about it.
>
> Until the, I believe it as the 19th of March, or the 18th, that was when he was served, which was beyond the Statute of Limitations. And that being the situation, the Motion for Summary Disposition, I believe that's under © (sic) (7) is granted, 2.116.

(Exhibit "C" TR Vol II pgs 98-99.) Plaintiff's counsel attempted to introduce further evidence that he claimed was relevant and when denied commented that he would be filing a motion for Rehearing and the trial court remarked:

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> It's not going to be granted in all likelihood, Mr. Daoudi, because I'm not persuaded there's been any probable error. This hearing went on over a two-day period with a number of witness, if those things were relevant they should have been presented then. They were not. Not once I made a ruling.

(Exhibit "C" TR Vol II p 101.)

Dr. Rengachary's counsel submitted an Order of Dismissal that was the same was entered by the trial court on October 22, 2004. Plaintiff thereafter filed a Motion for Rehearing/Reconsideration that did nothing more than rehash the same arguments raised in its Responses to Defendant's Motions. The Motion was denied by Order dated November 9, 2004. Plaintiff filed an Application for Leave to Appeal that was granted by the Court of Appeals on May 5, 2005.

2. The Hearing Dismissing the Remaining Defendants.

On the April 8, 2005, the trial court held a hearing on the Motion for Summary Disposition concerning the dismissal of the remaining Defendants. Defendants argued that since there were no direct allegations against the DMC and Harper Hospital and the Affidavit of Mary Ann Krueger established that Dr. Rengachary was neither an employee nor agent of the DMC or Harper Hospital, that any claims against them must be dismissed. **(Exhibit "D" p 10)** As for UNSA, Dr. Rengachary's employer, Defendant argued that since Plaintiff voluntarily pursued an action against both the agent and the principal, once the agent had been dismissed, a claim could proceed against the principal.

Plaintiff's counsel requested the trial court rely on a Kentucky case (involving a completely different factual background and where the Kentucky Supreme Court relied on prior Kentucky law in rendering its ruling). Additionally, counsel also argued cases involving covenants not to sue and dismissal without prejudice as an analogy to the instant matter. **(Exhibit "D" p 12-13.)**

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The trial court agreed with Defense counsel and granted the Defendants' Motion and dismissed the case. **(Exhibit "D" p 17.)** Thereafter, Defense counsel submitted an Order Granting Summary Disposition and dismissing Plaintiff's lawsuit in its entirety, which was entered by the Wayne County Circuit Court on April 20, 2005. Plaintiff then pursued an appeal by right. The Court of Appeals consolidated the two appeals, placed the entire case on the expedited track, and rendered its Opinion on November 1, 2005.

B. The Court of Appeals Case.

The Court noted that whether a service of process issued decided under MCR 2.117(C)(7) required a jury trial pursuant to MCR 2.116(I)(3) was an issue that had not yet been directly addressed by case law. Accordingly, the Court of Appeals erroneously determined that cases involving the six-month discovery rule were appropriate for this analysis.

The case that the Court found to be most on point was *Kermizian v Sumcad,* 188 Mich App 690; 470 NW2d 500 (1991). The Court explained that *Kermizian* "resolved a previous split among Court of Appeals panels regarding preliminary factual issue in the context of MCR 2.117(C)(7) motion." In *Kermizian*, since the general two-year Statute of Limitations had expired, Plaintiff was attempting to take advantage of MCL 600.5838(2), which allows for the filing of a medical malpractice claim within six months following when Plaintiff discovered, or should of discovered the existence of the claim. 188 Mich App 691. Following the deposition of plaintiff and two physicians, the issue arose regarding when Plaintiff had reason to know that the surgery was performed in an improper manner. *Id.* at 696.

The Court of Appeals noted that the question then became whether the Court could properly decide the preliminary factual issue, or was it required to submit it to the jury. It adopted the reasoning in *Moss v Pacquing*, 183 Mich App 574; 455 NW2d 339 (1990), and concluded that

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the issue required a jury trial because there was a disputed factual issue. Additionally, the Court of Appeals also pointed out that the *Moss* court noted the long line of cases which held that a dispute concerning when the plaintiff discovered or should have discovered her cause of action was a question for the trier of fact.

Based on the similarity in the facts in the instant matter and those in the *Kermizian, Blana* and *Moss* cases, the Court of Appeals found that MCR 2.116(I)(3) should apply to issues of fact regarding service of process when they bear on motions under MCR 2.116(C)(7). Even though the Court also recognized that MCR 2.116(C)(3) "provides a separate basis for dismissal based merely on the insufficiency of service of process and, notably, MCR 2.116(I)(3) does not require a trial by jury." The Court of Appeals determined that because the expiration of the Statute of Limitations has the effect of permanently barring a cause of action, "facts related to service of process warrant consideration by a jury when the bare on the expiration of the Statute of Limitations." Accordingly, the Court held that plaintiff had a right to a trial by jury concerning the issues raised at the evidentiary hearing. By this ruling, unfortunately, the Court of Appeals has completely obliterated major portions of MCR 2.116(I)(3).

Turning to the summary disposition for the remaining Defendants, the Court of Appeals erroneously agreed with Plaintiff's position that even if Dr. Rengachary had been properly dismissed from the lawsuit, he could pursue his cause of action against the remaining Defendants. While the Court of Appeals relied on this Court's basic proposition that a malpractice Statute of Limitations which bars suit against an agent also bars suit against his principals, the Court found *Kambas v St. Joseph's Mercy Hospital of Detroit*, 389 Mich 249; 205 NW2d 431 (1973) and *Dyke v Richard*, 48 Mich App 115; 198 NW2d 797 (1972) (both cases were superceded by Statute regarding the last treatment rule) were not applicable because the

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principals were sued after the Statute of Limitations had expired, where as in the instance case, the DMC, Harper Hospital and UNSA were properly sued before the Limitations period ended. But, nowhere in the *Dyke* case does it set forth that the hospital was not timely served with the Summons and Complaint.

The Court of Appeals also pointed out that the dismissal with prejudice should not control the analysis. Instead, the Court must examine the effect of Dr. Rengachary's dismissal on Plaintiff's underlying claim. The Court held that Dr. Rengachary's dismissal was not on the merits and, therefore, did not operate to extinguish Plaintiff's underlying malpractice claim against the remaining Defendants. The Court believes that the cause of action survived because those Defendants had been properly served, and Plaintiff could have chosen to bring suit against them, alone. "Even if Plaintiff's right to sue Rengachary was procedurally extinguished, there was no release or adjudication extinguishing these substance of Plaintiff's underlying claim of malpractice." Since Rengachary's dismissal did not address the merits of his acts, those acts may remains as a basis for suit against the remaining Defendants.

Accordingly, this Application follows, and the Defendants respectfully request that this Court grant leave, due to the erroneous findings by the Court of Appeals.

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ARGUMENT

The Court of Appeals decision will have a profound effect on the trial courts, in that Plaintiffs will request a jury trial where disputed issues exist concerning service of process. The courts will spend most of their time conducting mini trials, which will delay the conclusion of a case, even more than what exists at present. Irrespective of the ground utilized by the trial court for the dismissal, the underlying issues involve insufficient service under MCR 2.116(C)(3), which the Court of Appeals correctly noted did not require a jury trial.

I.

THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE TRIAL COURT IS REQUIRED TO CONDUCT A JURY TRIAL ON A MOTION BROUGHT PURSUANT TO MCR 2.116(C)(3) AND (C)(7) WHERE THERE ARE DISPUTED ISSUES CONCERNING SERVICE OF PROCESS PRIOR TO EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS.

In respect to its ruling, the Court of Appeals erred for two reasons: 1) the Michigan Court Rules specifically provide that Motions for Summary Disposition for insufficient service of process brought pursuant to MCR 2.116(C)(3) do not require a trial by jury; and 2) the instant matter is not akin to the claimed-discovery issue in *Kermizian*, *Moss* or *Blana* since that issue is clearly a "material" issue in the case.

While the Court of Appeals correctly noted that whether this factual dispute concerning service of process warrants a jury has not been directly addressed by Michigan case law, the Court determined that cases involving the six month discovery rule were most closely on point. The pivotal case analyzed by the Court of Appeals was *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500 (1991). There, the Court of Appeals was asked to determine whether the question of when a plaintiff discovered or should have discovered a claim is a question of fact

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for the jury. The Court noted that since the adoption of the Michigan Court Rules in 1985, panels of the Court of Appeals disagreed over whether factual disputes when discovery occurred or should have occurred should be decided by the judge as a preliminary or by the jury. *Id.* at 580. In analyzing the issue, the court turned to *Blana v Spezia*, 155 Mich App 348; 399 NW2d 511 (1986), which held that such a dispute should be decided by the judge as a preliminary question. The majority was concerned that a jury might not be able to fairly decide when a plaintiff discovered or should have discovered the claim because of its desire to award the plaintiff damages. *Blana* at 353. Additionally, the majority further relied on MCR 2.116(G)(5), which required the trial court to consider affidavits and other evidence in deciding a Motion for Summary Disposition based on the expiration of the Statute of Limitations. This change to the Court Rules, the majority explained, "may indicate a broader role for the trial judge in deciding factual issues concerning the application of the Statute of Limitations." *Blana* at 354.

The *Kermizian* panel refused to follow *Blana* and instead adopted the reasoning of Judge Murphy's decision in *Moss v Pacquing*, 183 Mich App 574; 455 NW2d 339 (1990). There, Judge Murphy explained:

> At the time our Supreme Court adopted this Court Rule, there existed a long line of cases which held that, where there is a dispute concerning a date when a plaintiff discovered, or reasonably should have discovered, his cause of action, this factual determination is to be made by a jury. . . [citations omitted]. Accordingly we can only conclude that the issue of discovery is an issue to which a right to jury trial exists unless the facts are undisputed and the trial court can properly conclude that the plaintiff's claim is barred as a matter of law.

Id. at 580-81. Since the discovery rule did not require the plaintiff to know with certainty that the defendant committed malpractice before the six-month discovery period began to run, and the deposition testimony of plaintiff, defendant and a subsequent treater raised an issue of fact

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regarding when plaintiff had reason to know that the surgery was performed in an improper manner, the trial court could not decide the issue as a matter of law. *Kermizian, supra* at 694-95.

It is easy to see how the claimed-discovery cases could require a jury trial concerning when the plaintiff knew or should have know since that issue is central to the underlying malpractice case. Contrarily, service of process issues do not go to the heart of the claim and are in fact, preliminary matters.

MCR 2.116(I)(3) provides that:

> A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court . . . .

At the time this rule was adopted, a long line of cases existed that held where there is a dispute concerning the date when a plaintiff discovered, or should have discovered, the cause of action, the factual determination must be made by the jury. *Winfrey v Farhat,* 382 Mich 380; 170 NW2d 34 (1969); *Wallisch v Fosnaugh,* 126 Mich App 418; 336 NW2d 923 (1983), *lv den* 418 Mich 871 (1983); *Leyson v Krause,* 92 Mich App 759; 285 NW2d 451 (1979), *Leary v Rupp,* 89 Mich App 145; 280 NW2D 466 (1979); and *Kelleher v Mills,* 70 Mich App 360; 245 NW2d 749 (1976). (Cited in *Moss, supra,* at 580.) When reviewing *Moss*, the Court of Appeals could only conclude that "the issue of discovery is an issue to which a right to jury trial exists unless the facts are undisputed." *Moss* at 580-81.

But, on the issue of service of process, this Court has not attached a plaintiff's right to a jury trial. In *Clabaugh v Wayne Circuit Judge*, 228 Mich 207; 199 NW 710 (1924), the defendant claimed that the return of service was false and incorrect because the general agent of the corporation was never served with the Summons and Complaint. *Id.* at 208. (While this writer realizes that this case came about long before the current Court Rules, this Court's basic

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proposition regarding the review of service of process issues is valid today.) The defendant's motion was heard on affidavits, with counsel for both parties developing a strenuous controversy as to the burden of proof, and neither asked that witnesses be heard on the issue involved. *Id.* at 211. On review, this Court pointed out that:

> If the trial court had discretionary right to decide the question of fact before it upon affidavits, it was for that court, and not this, to judicially determine whether the falsity of the return had been established to its satisfaction by a convincing preponderance of the proofs so presented. Either of the parties to the litigation was entitled to have testimony taken on that issue if requested and the court had a right in its discretion to so order if deemed necessary to reach a just conclusion as to such fact.

Clabaugh at 212. Based on this proclamation, this Court recognized the trial court's ability to hear testimony from witnesses, and make a determination. This logic is further supported by *Garey v Morley Brothers,* 234 Mich 675; 209 NW 116 (1926), where this Court stated:

> That courts should proceed with caution in overturning the certificate of an officer charged with the duty of serving process, and should require unequivocal, clear, and convincing evidence of the falsity of the returns attacked before doing so.

Id. at 678. Further, this Court borrowed language from the Supreme Court of Wisconsin in *Delph v Smith,* 354 Mich 12; 91 NW2d 854 (1958) that:

> Any circumstantial evidence worthy of consideration in support of the denial of service by the interested party, will suffice to make the denial prevail over the return, providing of course, that the trial judge so considers.

Id. at 16 (quoting *Mullings v LaBahn,* 244 Wis 76, 83; 11 NW2d 519 (1943).) While this Court placed the burden on the person who attacks the return of service to show clearly and convincingly that the return is false, this Court did not require a jury trial.

Even though the instant matter adds the expiration of the Statute of Limitations to the equation, the underlying premise is still that Defendant challenges the issue of service of process

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under MCR 2.116(C)(3) and the trial court can render a decision on the disputed facts as noted by the aforementioned cases.

Furthermore, in *Gladych v New Family Homes, Inc.*, 468 Mich 594; 644 NW2d 705, *rehrg den'd*, 469 Mich 1222; ___ NW2d ___ (2003), this Court analyzed the insufficient service of process and the Statute of Limitations. The *Gladych* plaintiff alleged an injury occurring on January 23, 1996 and filed a Complaint on January 22, 1999, one day before the expiration of the three-year limitations period. Plaintiff made three unsuccessful attempts to serve the defendants, sought a second Summons on April 20, 1999, and finally served the defendants on May 4, 1999. *Id.* at 596.

Defendant moved for summary disposition because the Summons and Complaint were not placed in the hands of an officer prior to the expiration of the Statute of Limitations as required by MCL 600.5856. *Id.* The trial court agreed and dismissed the action. The Court of Appeals reversed this Court accepted leave. The question to be briefed was whether *Buscaino v Rhodes,* 385 Mich 474; 189 NW2d 202 (1971), overruled in part on other grounds by *McDougall v Schanz,* 461 Mich 15; 597 NW2d 148 (1999), the crucial case for the Court of Appeals, was inconsistent with the language of MCL 600.1901 and of MCR 2.101(B) to the effect that a civil action is commenced by filing a complaint with the court. *Id.* at 597.

After a thorough analysis of the issue, this Court overturned the Court of Appeals and affirmed the trial court's grant of summary disposition. (But did determine that the case would have limited retroactive application.) *Gladych* at 607. While the issue involved service of process and the Statute of Limitations, nowhere in the 14-page opinion did this Court determine or mention that this issue is one to be decided by the trier of fact.

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This Court should grant leave to consider whether the Court of Appeals erroneously concluded that disputed issues under a Motion for Summary Disposition concerning insufficient service of process before the expiration of the Statute of Limitations require a jury trial. It is axiomatic that facts relating to service of process are less central to the underlying claim then facts concerning the discovery of the substance of the claim, *Kermizian, supra,* at 692, or actual damages incurred, *Phillips v Mirac, Inc,* 470 Mich 415; 685 NW2d 174 (2004). **(Exhibit "A" p 11-12.)** Unfortunately, this thinking is turned on its head by requiring a jury trial on the disputed facts concerning service of process. Moreover, the Court of Appeals places vast emphasis on the fact that "dismissal due to the expiration of the statute of limitations . . . likely permanently bars a cause of action." **(Exhibit "A" p 14.)** This thinking then requires a jury trial in all cases where the statute of limitations is an element, even issues raised under MCR 2.116(C)(1) through (6) and (8). At that point, we have completely eviscerated the Legislature's power to enact Court Rules.

Instead, the Legislature clearly gave the trial court the power to conduct an evidentiary hearing to resolve disputed facts concerning service of process raised in a Motion for Summary Disposition under MCR 2.116(C)(3). The fact that the expiration of the Statute of Limitations is involved should not change that power. Judge Beasley stated it nicely in his concurrence in *Whitmore v Fabi,* 155 Mich App 333; 399 NW2d 520 (1986), "not all issues that may be raised under MCR 2.116(C)(7) involve the right to jury trial . . ." *Id.* at 344. The judge further stated that:

> The highly efficient, economical immediate trial option provided in MCR 2.116(I)(3) for the resolution of factual disputes in motions for summary disposition would be rendered wor4thless in the medical malpractice statute of limitations situation if every factual dispute was required to be submitted to a jury upon a party's timely demand for a jury trial. Such a procedure would require the selection of a separate jury merely to resolve

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> the statute of limitations issues. Judicial economy would not be served by such an unwieldy 'immediate trial' procedure.

Id. He also explained that the trial judge:

> Faces the predicament of choosing between inefficiently and wastefully conducting two separate jury trials or conducting a single jury trial where the risk is high that the jury will nullify the legislative intent embodied in the statute of limitations. MCR 2.116(I)(3) was not intended to create such a predicament for a trial judge facing a motion for summary disposition under the medical malpractice statute of limitations which involves some factual disputes.

Whitmore, supra, at 345.

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II.

THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER A PLAINTIFF WHO VOLUNTARILY CHOSE TO SUE BOTH THE PRINCIPAL AND AGENT CAN PROCEED AGAINST THE PRINCIPAL WHEN THE AGENT IS DISMISSED WITH PREJUDICE FOR FAILURE OF SERVICE OF PROCESS PRIOR TO THE EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS.

Under agency/principal law, a plaintiff can file suit against just the principal or against both the agent and the principal. However, where a plaintiff decides to bring suit against both the principal and the agent, the deep rooted common law principle that release of the agent will discharge the principal will apply.

In *Theophelis v Lansing General Hospital,* 430 Mich 473; 424 NW2d (1988) this issue arose. There, two of the named defendants, a nurse anesthetist and an anesthesiologist, where not employees of the hospital but alleged to be ostensible agents. They were employed by Capital Anesthesiologists, P.C., who had a contract with the hospital to provide anesthesiology services. *Id.* at 480. The plaintiff settled with the employees of Capital Anesthesiologists, P.C. and continued to pursue a claim of vicarious liability against the hospital. The hospital moved to strike all claims against it because of the settlement with the anesthesiologist and nurse anesthetist, which the hospital claimed operated to release it from vicarious liability of those two individuals. *Id.* at 478-79. Even though the trial court recognized the common law principle that release of the agent discharges the principal, the motion was denied. *Id.* The jury returned a verdict against the hospital in the amount of $1 million solely on the theory of vicarious liability as to the earlier dismissed parties. *Id.* at 480.

The judgment was initially affirmed by the Court of Appeals but was reversed on rehearing. On review, this Court noted that "a common law, a valid release of an agent for tortious conduct

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operates to bar recovery the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal." *Id.* at 480 (citing 53 Am Jur 2d, *Master & Servant*, § 408, pp 416-18). Plaintiffs argued that the Common Law Rule was inapplicable in the instant case by reason of the Michigan contribution act, MCL 600.2925. However, this Court made a distinction between the Common Law Rule governing contribution with the Common Law Doctrine that release of an agent discharges the principal from vicarious liability. This Court ruled that the Statute did not abrogate that Common Law Agent/Principal Rule. Accordingly, this Court held that settlement with the anesthesiologist released the hospital from any claim for vicarious liability. *Theophelis* at 490-91.

Years later, this Court reviewed a situation where plaintiff chose to sue only the principal. In *Cox v Board of Hospital Managers for the City of Flint*, 467 Mich 1; 651 NW2d 356 (2002), the plaintiff brought suit against the hospital on a theory of vicarious liability for the alleged negligence of neonatal intensive care unit. Although an individual physician was named, he was dismissed before trial. *Id.* at 15. Although much of the opinion is inapplicable to the instant matter, this Court made a number of points that are helpful.

While the unit itself could not be held as the basis for defendant's vicarious liability, the negligence of the agents working in the unit could. However, plaintiffs must prove the negligence of at least one agent of the hospital to give rise to vicarious liability. *Cox* at 13.

It is important to keep in mind when reviewing the *Cox* opinion that this Court made no mention of the theory of vicarious liability applying to the dismissed defendant, Dr. Moreno.

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This is in keeping with the Court's holding in *Theophelis v Lansing General Hospital*, *supra*, that release of the agent also releases the principal.[6]

When comparing the Court's analysis in *Theophelis* with *Cox*, the only conclusion that can be reached is that where a plaintiff chooses to sue both the agent and the principal, once the agent is dismissed/released, there is no agent for vicarious liability to attach to. This continues the common law practice that release of the agent releases the principal.

In the instant case, Plaintiff chose, voluntarily, to pursue a claim against both the agent (Rengachary) and his employer (UNSA). He released Rengachary from this lawsuit by failing to effectuate appropriate service of process. Since service was not effectuated on Rengachary prior to the expiration of the Statute of Limitations, there is no one to attach vicarious liability to.

As for the hospital and DMC, Plaintiff failed to come forth with any evidentiary support to rebut the Affidavit of Mary Ann Krueger, affirming that Dr. Rengachary was neither an agent or employee of DMC or Harper Hospital. Accordingly, Plaintiff failed to establish any agency relationship with the DMC or Harper Hospital and, therefore, the trial court appropriately dismissed those Defendants.

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[6] See also *Nippa v Botsford General Hospital*, 257 Mich App 387; 668 NW2d 628 (2003) (where the Court held that all procedural requirements are applicable to the hospital in the same manner and form as if the doctor were a named party to the lawsuit. The law treats the principal and the agent as sharing a single identity, transporting the acts of the doctors (the agents) to the hospital (the principal).

CONCLUSION

Based on the foregoing legal authority, Appellants respectfully request that this Honorable Court grant leave, and allow the parties to fully brief these issues or, in the alternative, summarily reverse the Court of Appeals, and reinstate the Orders of the Wayne County Circuit Court dismissing this case in its entirety.

Respectfully submitted,

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